



515385

DEPARTMENT

ATTORNEY GENERAL/MPCA

STATE OF MINNESOTA

Steve
Office Memorandum

TO: REILLY TAR FILE

DATE: 1/21/85

FROM: STEVE SHAKMAN
SPECIAL ASSISTANT ATTORNEY GENERAL

PHONE:

SUBJECT: NOTES ON CONSENT DECREE REVISIONS PROPOSED BY REILLY TAR AT
12/19/84 AND 1/9/85 MEETINGS

I have noted the areas of more significant dispute with an
"*. I have redrafted several parts along the lines of the draft
EPA/MPCA Decree with Joslyn Manufacturing Company, and attached
those parts at the back of the memo. I have not yet redrafted
the access provision along the lines of the NL decree.

PART B (pp. 1-2)

Reilly wishes to add the three landowner defendants. The
State has no objection.

Part C.4 (p. 3)

Reilly wishes to change the characterization of the 1978
amended complaint to delete the word "carcinogenic" from the
allegation that "carcinogenic PAH substances. . .had entered the
ground water beneath the site."

Reilly also wishes to change the characterization to delete
"thousands of persons" from the allegation that the carcinogenic
PAHs "threatened to contaminate aquifers relied on for public
water supply by thousands of persons."

While the objectionable statements simply restate what was
in our complaint, I see no problem with modifying the
characterization to state that spread of Reilly's coal tar and
creosote wastes threatened serious and widespread contamination
of the aquifer systems in the St. Louis Park area.

Part C.9 (p. 5)

Reilly wishes to eliminate our relatively specific
allegations as to pollution mechanisms and replace them with the

very general allegation of Part A.2. of their June 21, 1984 proposed Decree. Because of the need to define what is "current knowledge and understanding" of the problem, I favor using our paragraph or a modified version thereof.

Part C.10. (p. 5)

Reilly wishes to add other parties and their cross-claims. The State has no objection.

Part C.11. (p. 5)

Reilly objects to the paragraph summarizing which of its defenses have been stricken by the Court. We could agree to drop this paragraph and shorten the previous paragraph to say Reilly has denied liability.

*Part C.12. (p. 6)

Reilly wishes to add more studies. We may wish to add an introduction explaining that this list is included to assist in the determination of what was known at the time of settlement in the event plaintiffs seek further relief for unknown pollutants or unknown conditions.

Part D. (p. 9)

1. Reilly wishes to change "risks believed" to "risks alleged." That is no problem. Reilly's preferred language "risks, if any, alleged" is incorrect because risks have clearly been alleged.
2. Reilly wants language on how uncertain the scientific judgments underlying plaintiff's case are. Plaintiffs cannot agree to uncertainties because of implications in other cases.
3. Reilly wants a statement that no side shall be deemed the prevailing party. Plaintiffs believe legal fees should be addressed more directly.

*Part E. (pp. 9-13)

1. Reilly wishes to use Part E from its 6/21/84 draft which states that the RAP is designed to protect from "any chemical substance at the site." This statement is broader than the purpose of the RAP. We should adhere to known releases and known threatened releases.
2. Reilly wishes to drop the long summation of the RAP. It would agree to a sentence or two stating the basic

components. The State should agree to this; the summation was put in by EPA headquarters for its management who didn't care to read the whole RAP.

Part F. (pp. 13-14)

- *1. Reilly objects to dual review by EPA and MPCA. Dale Wikre will be attending a meeting with EPA in Washington related to this topic on January 16. We do not expect EPA to agree to yield its overall supervision to the State.
- *2. Reilly objects to lack of a time deadline for EPA and MPCA to resolve disputes. I would propose the 21 days time limit used for Review of Submittals in Part H.
- *3. Reilly wants some informal dispute discussion period. I suggest opportunity be provided to consult with one another as in Joslyn draft at V.B.6 (p. 10). See new part F.
- *4. Reilly wants some relief from time deadlines where a matter is in dispute, or where it has reasonable grounds for extending time. I suggest following format of Joslyn draft, ¶ XXIV (pp. 26-27). See new part L -- on separate sheet.

*Parts G. and H. (pp. 15-18)

Reilly wishes Schedule for Contingencies and Review of Submittals to be merged into Resolution of Disputes. See reworking of Joslyn draft (¶ V. (pp.8-9) in new Part F.

*Part I (p. 18)

Reilly wishes to have authority to stop work if danger (Project Leader has 24 hour stop authority under Part K., pp. 22-23.) Becky Comstock says she has alternative language from another agreement. The State has no objection to granting Reilly this authority.

Part J. (pp. 19-20)

- 1. Reilly wants quarterly rather than monthly report.
- 2. Reilly wants separate section on whom to notify and wants to be relieved of certified mail.

*Part K. (pp. 20-21)

- 1. Reilly objects to amount of stipulated penalties and to higher amount of delays beyond 30 days.

2. Reilly wants broader defenses to penalties, not just that it was not in violation. Reilly will agree not to challenge legality of penalties.
3. Reilly wants agreement to have no penalties where interim deadline is missed but task ultimately done on time. This provision would promote confusion and is not acceptable to the State.
4. See revised K based on Joslyn draft, ¶ XXII (pp. 24-25)

*Part L. (pp. 21-22)

1. Reilly wants standard force majeure clause (e.g. labor problems)
2. Reilly wants freedom to extend certain dates where reasonable advance notice.
3. See revised L. based on Joslyn draft, ¶ XXIV (pp. 26-27)

*Part M. (pp.. 22-23)

Reilly objects to dual approvals (EPA and MPCA) for all field modifications.

*Part N (pp. 24-25)

1. Reilly would like State to take lead in obtaining access.

With the possible exception of the drift - Platteville work (which remains to be specifically delineated) the access question may be important only in regard to abandonment of multi-aquifer wells. Where Reilly is unable to gain access from the property owners, the State could invoke its power (for MPCA, Minn. Stat. § 115B.17, subd. 4 and for MDH, Minn. Stat. § 156A.05) and designate Reilly's contractors as its agents. This delegation was done by the MPCA in the NL decree. See new paragraph N to be drafted based upon NL decree _____. Such a delegation makes the hold harmless agreement opposed by Reilly all the more essential.

2. Reilly wants the last paragraph to include provisions of access at no cost by St. Louis Park, its H.R.A., and the nominal defendants.

***Part P. (pp. 26-27)**

Reilly has shown no movement on its June, 1984, past cost offer. If Reilly were to make a more attractive offer the State could reconsider its earlier approach of allowing payment spread over several years.

***Part Q. (p. 27)**

Reilly refuses to pay any future costs of the plaintiffs in overseeing any limitation of the RAP. The State would consider a limiting Reilly's annual, or total, payments for future costs.

***Part R. (pp. 27-28)**

Reilly opposes the hold harmless agreement. A compromise position would be to eliminate the diminution in property value clause (a remote possibility) and to limit Reilly's indemnity to its negligent acts or intentional torts. The State could also add an agreement to cooperate with Reilly in any defense Reilly is called upon to make under this agreement.

Part S. (p. 28)

Reilly wants to add a broader description of chemicals and to strike "contaminants and pollutants."

Part T. (pp. 29-30)

1. Reilly wishes to strike the last clause of the first paragraph, which requires the Regional Administrator and the Director to determine which of the conflicting provisions is more stringent.
2. Reilly also wishes to strike the second paragraph, concerning NPDES/SDS permits, as redundant.
3. Reilly, and the U.S., believe it is not possible to give NPDES review to the federal district court, contrary to Minnesota Statutes. I don't believe it is worth pursuing this idea any further.
- *4. Reilly also raised the extent to which MPCA staff could commit itself to adhering to the discharge numbers in the draft NPDES permit. As explained, the staff cannot make any such commitment. If Reilly is worried about changes in the final NPDES permit, the plaintiffs could suggest a provision enabling Reilly to propose modifications to the RAP in light of subsequent permit requirements. See new Part T₁ ____ based on Part VI (pp. 10-12) of the draft Joslyn decree.

*Part U. (pp. 30-32)

1. Reilly wants a broader definition of the known or potential hazards. It will propose new terms. Plaintiffs must protect two concerns: (a) unknown chemicals, including presently untested constituents of coal tar, causing a later problem, and (b) unknown and unforeseen (i.e. not recognized by a contingent action) migrations of known chemicals.
2. Reilly does not want the release limited, as provided by EPA's settlement policy, to causes of action cited in the complaint. I think, consistent with the doctrine of bar and merger that the release could be extended to claims which could have been brought under the facts known.
3. Reilly strongly desires a release effective with its payments of past costs. The decree as drafted provides no release until all the requirements of the RAP are completed (a date at least several decades away). A compromise would be to grant the release when the payments and the initial capital construction are completed. With the continuing jurisdiction clause, the plaintiffs should be adequately protected.
4. Reilly wants St. Louis Park and Hopkins added in several places.
5. Reilly wants explicit statements that attorneys fees and natural resource damages are covered.
6. Reilly wants the first sentence of the last paragraph modified to delete reference to "degree of performance" and to limit government action (under this sentence only) to response actions and enforcement of Decree where Reilly fails to maintain compliance. (The next sentence provides additional powers where an eminent and substantial endangerment is presented.)

Part X. (pp. 33)

Reilly does not want any severability clause. Plaintiffs could suggest a modification that "remaining clauses shall remain in full force and effect to the extent practicable in light of the provisions struck down."

Part Y. (p. 34)

Reilly wants all parties to have right to withdraw or change consent in light of public comments.

*Part AA. (p. 34)

Reilly does not want to pay anything for a bond or other security to assure its performance. It would provide financial statement as required under RCRA post-closure provisions. Government must have some greater assurances, particularly for contingencies which may not come to pass for many years.

SS:cg
Attachment

F.

Resolution of Disputes

1. If a dispute arises as to the meaning of any part of this Consent Order or concerning the implementation of the RAP, other than with respect to the approval of submittals, Reilly shall provide the Regional Administrator and the MPCA Director with a written statement supporting its position. The Regional Administrator and the MPCA Director shall review the statement and issue a proposed order resolving the issues in dispute. Within ten (10) days of receipt of the proposed order, Reilly may request that the Court review the issues in dispute. If Reilly elects to not request Court review, the Regional Administrator and the MPCA Director's order shall govern the interpretation and implementation of this Consent Order with respect to the issues in dispute. If Court review is requested, Reilly shall have the burden of demonstrating that the proposed Order has no reasonable basis consistent with the purposes and objectives of this Consent Order and RAP.

2. In the event there is a dispute between the U.S. EPA or the MPCA and Reilly regarding any submittal, document, report, or schedule (collectively "submittal"), for which approval is required by this Consent Order, or the Exhibits thereto, the dispute shall be resolved in the following manner.

a. The Regional Administrator and the MPCA Director shall review each submittal made by Reilly as required by this Consent Order within thirty (30) calendar days of receipt (except for the Feasibility Study, which requires a ___ day period and the QA/QC Plan, which requires _____ days for complete review) and notify Reilly in writing by the thirtieth calendar day, or the first working day thereafter, of their approval, disapproval, or

modification of the submittal. In the event the submittal requires approval and is approved, it shall become an integral and enforceable part of this Consent Order. In the event that the submittal requires approval and is disapproved in whole or part, the Regional Administrator and the MPCA Director shall notify Reilly of the specific inadequacies in writing, and shall state the necessary amendments or revisions and the reasons therefor. In the event that the submittal is modified, the Regional Administrator and the MPCA Director shall notify Reilly of the specific modification(s) made to the submittal and the reason(s) therefore.

6. Within twenty-one (21) calendar days of receipt of any notice of disapproval or modification, or on the first working day thereafter, Reilly shall (1) submit revisions to correct inadequacies, (2) respond to the modification, or (3) state in writing the reasons why the submittal, as originally submitted, should be approved.

c. If, within fourteen (14) calendar days from the date of Reilly's submission under 2.B., above, or the first working day thereafter, the parties have not reconciled all issues in dispute with respect to said submission, the Regional Administrator and the MPCA Director shall propose modifications in the submittal as they deem necessary.

d. Reilly may, within ten (10) days of receipt of the proposed modifications, request that the Court review of the issues in dispute. If Reilly elects to not request Court review, the Regional Administrator and the MPCA Director's proposed modifications shall become an integral and enforceable part of this Consent Order. If MPCA Board review is requested, Reilly shall have the burden of demonstrating that the proposed Order has no reasonable basis consistent with the purposes and objectives of this Consent Order and RAP.

e. The U.S. EPA and the MPCA and Reilly shall provide the opportunity to consult with each other during the review of submittals or modifications under this Part.

3. During the resolution of any dispute under paragraphs 1 and 2 above, and during any subsequent judicial proceedings, Reilly shall continue to implement those portions of the RAP which the Regional Administrator and MPCA Director determine can be reasonably implemented pending final resolution of the issues in dispute.

REILLY

T₁

Permits

1. The implementation of this Consent Order may require the issuance of governmental permits, authorizations or orders (hereinafter referred to as "permit") by the MPCA or other agencies. This Consent Order is based upon the expectation that the terms and conditions of said permits will be issued consistent with the response activities contained in this Consent Order and the Exhibits thereto.

2. Reilly shall notify the U.S. EPA and the MPCA Director of all non-MPCA permits which are needed to implement the requirements of this Consent Order and the Exhibits thereto as soon as Reilly becomes aware of the need for the permit. Reilly shall provide the U.S. EPA and the MPCA Director with a copy of all such permit applications at the time that the application is submitted to the entity issuing the permit.

3. If a permit is not issued, is issued or is renewed in a manner which is materially inconsistent with the requirements of the approved RAP, Reilly may notify the U.S. EPA and the MPCA Director of its intention to propose modifications to the RAP. Notification by Reilly of its intention to propose modifications must be submitted within seven (7) days of receipt by Reilly of notification that (1) a permit will not be issued; (2) a permit has been issued or reissued; or (3) a final judicial determination with respect to issuance of a permit has been entered. Within thirty (30) days from the date it submits its notice of intention, Reilly shall submit to the U.S. EPA and the MPCA Director its proposed modifications to the RAP or with an explanation of its reasons in support thereof.

4. The Regional Administrator and the MPCA Director and/or the MPCA Board shall review and approve, disapprove or modify Reilly's proposed modifications to the RAP in accordance with Part F of this Consent Order. If Reilly submits proposed modifications prior to a final judicial determination of any appeal taken on a permit needed to implement this Consent Order, the Regional Administrator and the MPCA Director may elect to delay review of the proposed modifications until after such final judicial determination is entered. If the Regional Administrator the MPCA Director elects to delay review, Reilly shall continue implementation of this Consent Order as provided in Paragraph 5. of this Part.

5. During any judicial review of any permit needed to implement this Consent Order or during review of any of Reilly's proposed modifications as provided in Paragraph 3., above, and during any subsequent judicial proceedings taken in accordance with the provisions of Part F. Reilly shall continue to implement those portions of the RAP which the Regional Administrator the MPCA Director determines can be reasonably implemented pending final resolution of the issues in dispute.

REILLY

K

Failure to Make Timely Submittals
or Implement Tasks on Time

1. For each day that Reilly fails to implement tasks or to make a submittal to the Regional Administrator and the MPCA Director in accordance with the time schedules contained in the Exhibits to this Consent Order or any other time schedule approved or modified by the Regional Administrator and the MPCA Director, Reilly shall be obligated to pay into the Hazardous Substance Response Trust Fund and the Environmental Response, Compensation and Compliance Fund of the Treasury of the State of Minnesota the sum of one thousand dollars (\$1,000) (\$500 to each Fund) for each day of the first thirty days and the sum of five thousand dollars (\$5,000) (\$2,500 to each fund) for each day of delay thereafter.
2. Reilly shall not be liable for payment under this Part if it has submitted to the Regional Administrator and the MPCA Director a timely request for an extension of schedules under Part L of this Consent Order and such request has been granted.
3. Upon determination by the Regional Administrator and the MPCA Director that Reilly has failed to make a submittal or implement a task as required, the Regional Administrator and the MPCA Director shall immediately give written notice to Reilly of the failure, specifying the provision of the Consent Order which has not been complied with. Unless Court review under the following paragraph is sought, Reilly shall pay the requested sum within twenty (20) days of receipt of notification from the Regional Administrator and MPCA Director that payment is due.

4. Reilly retains the right to dispute under Part F all factual bases for the Regional Administrator and the MPCA Director's determination that a submittal has not been made or task implemented in a timely fashion. However, Reilly waives any rights it may have to challenge, on legal grounds, the requirement that it make payments under this Part.

5. Payments required by this Part shall accrue from the date on which the submittal was to have been made or the date on which Reilly deviates from the implementation schedule. Payments required by this Part shall cease to accrue when Reilly delivers the required submittal to the Regional Administrator and the MPCA Director or the date on which Reilly performs or completes the task required in the implementation schedule.

6. Nothing in this Part shall be construed as prohibiting or in any way limiting the ability of the U.S. or the State to seek civil penalties or other relief available under federal or State law for any noncompliance with this Consent Order, except that where Reilly has made payment required under paragraph 1 above for late submittals the United States and the State shall not seek penalties for the noncompliance on which said payments were based.

REILLY

L

Extensions of Schedules

Extensions shall be granted if requests for extensions are submitted in a timely fashion and good cause exists for granting the extension. All extensions must be requested by Reilly in writing. The request shall specify the reason(s) why the extension is needed. Extensions shall only be granted for such period of time as the Regional Administrator or the MPCA Director determines is reasonable under the circumstances. A requested extension shall not be effective until approved by the Regional Administrator the MPCA Director.

The Regional Administrator and the MPCA Director may extend the time schedules contained in this Consent Order for a period not to exceed ninety (90) days except that, if an extension is needed as a result of (1) delays in the issuance of a necessary permit which was timely applied for; (2) judicial review of the issuance, non-issuance or re-issuance of a necessary permit; or, (3) judicial review under Part F-H of this Consent Order, the Regional Administrator and the MPCA Director may extend the time schedules for a longer period.

The burden shall be on Reilly to demonstrate to the satisfaction of the Regional Administrator or the MPCA Director that the request for the extension has been submitted in a timely fashion and that good cause exists for granting the extension. Extensions shall be granted where Reilly demonstrates that the reasons the extension is needed is due to:

(1) Circumstances beyond the reasonable control of Reilly, including delays caused by the U.S. EPA or the MPCA;

(2) Review resulting from the good faith invocation by Reilly of the

resolution of disputes section of Part F of this Consent Order, which review results in delays in implementation of this Consent Order making it impossible for Reilly to meet the required schedules; and,

(3) Delays which are directly attributable to any changes in permit terms or conditions or refusal to grant a permit needed to implement the requirements of this Consent Order, as contemplated under Part ____ of this Consent Order, if Reilly filed a timely application for the necessary permit.

The Regional Administrator or the MPCA Director's decision on extensions shall be considered a final action of the U.S. EPA and the MPCA appealable to a court of appropriate jurisdiction.